Susu Lembu Asli Marketing Sdn Bhd v Dutch Lady Milk Industries Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–22–190 OF 2002
AZMEL J
16 OCTOBER 2003

Arbitration — Agreement — Incorporation of arbitration clause — Purported rescission of agreement — Whether arbitration clause void and ineffective in view of rescission of agreement — Whether arbitration clause an autonomous agreement independent from agreement

Arbitration — Stay of proceedings — Application — Dispute to be referred to arbitration — Stay of court proceedings pending reference to arbitration — Whether court proceedings had commenced — Whether any steps taken by applicant in court proceedings — Whether sufficient reasons why matter ought to be referred to arbitration — Whether applicant ready and able to do all things necessary for proper conduct of arbitration — Arbitration Act 1952 s 6

Civil Procedure — Stay of proceedings — Arbitration — Dispute to be referred to arbitration — Stay of court proceedings pending reference made to arbitration — Whether court proceedings had commenced — Whether any steps taken by applicant in court proceedings — Whether sufficient reasons why matter ought to be referred to arbitration — Whether applicant ready and able to do all things necessary for proper conduct of arbitration — Arbitration Act 1952 s 6

The plaintiff and the defendant executed a production agreement under which the defendant agreed to manufacture, pack and supply for the plaintiff, various dairy products. The plaintiff failed to make payments for the products supplied by the defendant. The defendant issued a letter of demand to the plaintiff to demand for amount owing. The plaintiff then issued a letter to the defendant purporting to rescind the production agreement on the grounds that the plaintiff's consent thereto was vitiated by fraud and/or misrepresentation on the part of the defendant and alternatively, to terminate the production agreement on account of breach of the term thereof. The defendant refuted the plaintiff's right to rescind or terminate the production agreement or to claim damages from the defendant. The plaintiff subsequently filed a writ of summons and statement of claim against the defendant. This was the defendant's application for a stay of the court proceedings pending reference made to the arbitration. The arbitration clause in the production agreement stipulated that 'any dispute or difference which may arise between the parties at any time hereafter whether during the continuance in force of this agreement or upon its termination, touching any matter or thing therein contained or the operation or construction of this agreement or any matter or thing in any way connected with, arising from or in relation to this agreement or the rights, duties, liabilities of the parties hereunder shall be finally settled by arbitration in accordance with the Arbitration Act 1952'. The reasons advanced by the plaintiff as to why this matter should not be referred to arbitration were, inter alia: (a) the dispute between the parties did not fall within the scope of the arbitration clause; (b) the arbitration clause was void and ineffective as the production agreement had been rescinded by the plaintiff; (c) the arbitrator cannot determine the scope of his own jurisdiction; and (d) the arbitrator did not have the power to order rescission pursuant to s 34(1) of the Specific Relief Act 1950.

Held, allowing the defendant's application:

(1) In order to succeed under s 6 of the Arbitration Act 1952, the applicant must satisfy these requirements: (a) legal proceedings had commenced against the applicant in respect of a matter which had been agreed should be referred to arbitration ('the first requirement'); (b) no other steps in the proceedings was taken by the applicant before the making of the application for stay ('the second requirement'); (c) there was no sufficient reason why the matter ought not to be referred to arbitration ('the third requirement'); and (d) the applicant was at the time of the application, ready and able to do all things necessary for the proper conduct of the arbitration ('the fourth requirement') (see para 6).

(2) In respect of the first requirement, the defendant had shown that the production agreement (which was the subject matter of dispute between the plaintiff and the defendant) contained an arbitration clause. In respect of the second requirement, the defendant had not taken any steps in the proceedings because all that it had done was to enter appearance (see paras 7–8).

(3) The disputes between the plaintiff and the defendant came within the scope of the arbitration clause. The words 'arising from' in the second limb of the arbitration clause were sufficiently wide to cover the determination of dispute as to whether the production agreement was induced by fraud or misrepresentation (see paras 16–17).

(4) Even if the production agreement was void ab initio, the arbitration clause would survive and remain effective as it was an autonomous agreement independent from the production agreement. In any case, the plaintiff did not raise any issue on the validity of the arbitration clause. Therefore, there was no merit in the plaintiff's contention that the arbitration clause was void and ineffective as the production agreement had been rescinded by the plaintiff (see paras 20–21).

(5) The issue of whether the production agreement was void ab initio was a dispute 'arising from' the production agreement and/or 'connected with' the production agreement within the ambit of the second limb of the arbitration clause. Hence, the arbitrator was empowered to finally deal with the issue of whether the production agreement was void ab initio (see para 23).

(6) An arbitrator appointed pursuant to the arbitration clause would have the power to decide whether the plaintiff's rescission of the production agreement was valid or otherwise. Section 34(1) of the Specific Relief Act 1950 was not a mandatory provision and therefore, other tribunals were not prohibited from deciding whether there was a valid rescission of an agreement. Accordingly, the defendant had satisfied the third requirement (see paras 32–33, 36).

(7) As for the fourth requirement, there were no doubts that the defendant remained ready and able to do all things necessary for the proper conduct of the arbitration (see para 37).

[**Bahasa Malaysia summary**

Plaintif dan defendan telah menyempurnakan satu perjanjian pengeluaran di mana defendan telah bersetuju untuk membuat, membungkus dan membekalkan untuk plaintiff, pelbagai produk tenusu. Plaintif telah gagal membuat pembayaran untuk produk yang dibekalkan oleh defendan. Defendan telah mengeluarkan sepucuk surat tuntutan kepada plaintif untuk menuntut jumlah yang perlu dijelaskan. Plaintif kemudian telah mengeluarkan sepucuk surat kepada defendan bertujuan untuk membatalkan perjanjian pengeluaran atas alasan-alasan bahawa persetujuan plaintif adalah tidak sah keran fraud dan/atau salah nyata di pihak defendan dan secara alternatif, untuk menamatkan perjanjian pengeluaran atas dasar perlanggaran terma. Defendan menyangkal hak plaintif untuk membatal atau menamatkan perjanjian pengeluaran tersebut atau untuk menuntut ganti rugi daripada defendan. Plaintif kemudiannya telah memfailkan satu writ saman dan pernyataan tuntutan terhadap defendan. Ini adalah permohonan defendan untuk penggantungan prosiding mahkamah sementara menunggu rujukan dibuat berhubung timbangtara. Klausa timbangtara dalam perjanjian pengeluaran menetapkan bahawa 'any dispute or difference which may arise between the parties at any time hereafter whether during the continuance in force of this agreement or upon its termination, touching any matter or thing therein contained or the operation or construction of this agreement or any matter or thing in any way connected with, arising from or in relation to this agreement or the rights, duties, liabilities of the parties hereunder shall be finally settled by arbitration in accordance with the Arbitration Act 1952'. Alasan-alasan yang dikemukakan oleh plaintif berhubung kenapa perkara ini tidak patut dirujuk kepada timbangtara adalah, antara lain: (a) pertikaian antara pihak-pihak tidak terangkum di bawah skop klausa timbangtara; (b)klausa timbangtara adalah terbatal dan tidak berkuatkuasa kerana perjanjian pengeluaran telah dibatalkan oleh plaintif; (c) penimbangtara tidak boleh menentukan skop bidang kuasa beliau sendiri; dan (d) penimbangtara tidak mempunyai kuasa untuk memerintah pembatalan menurut s 34(1) Akta Relief Spesifik 1950.

Diputuskan, membenarkan permohonan defendan:

(1) Bagi tujuan berjaya di bawah s 6 Akta Timbangtara 1952, pemohon perlu memuaskan keperluan tersebut: (a) prosiding undang-undang yang dimulakan terhadap pemohon berkaitan suatu perkara yang telah dipersetujui hendaklah dirujuk kepada penimbangtara ('keperluan pertama'); (b) tiada langkah lain dalam prosiding diambil oleh pemohon sebelum membuat permohonan untuk penggantungan ('keperluan kedua'); (c) tiada alasan yang memadai tentang kenapa perkara tersebut tidak patut dirujuk kepada penimbangtara ('keperluan ketiga'); dan (d) pemohon pada masa permohonan, bersedia dan mempu membuat segala yang perlu untuk pengendalian betul penimbangtaraan ('keperluan keempat') (lihat perenggan 6).

(2) Berhubung keperluan pertama, defendan telah menunjukkan bahawa perjanjian pengeluaran (yang merupakan perkara pokok pertiakaian antara plaintif dan defendan) mengandungi satu klausa timbangtara. Berhubung keperluan kedua, defendan tidak mengambil apa-apa langkah dalam

prosiding kerana apa yang perlu dibuat olehnya adalah hanya untuk memasukkan kehadiran (lihat perenggan-perenggan 7–8).

(3) Pertikaian antara plaintif dan defendan terangkum dalam skop klausa timbangtara. Perkataan-perkataan 'arising from' dalam cabang kedua kepada klausa timbangtara amat luas untuk meliputi penentuan pertikaian sama ada perjanjian pengeluaran telah dipengaruhi oleh fraud atau salah nyata (lihat perenggan-perenggan 16–17).

(4) Walaupun perjanjian pengeluaran adalah batal ab initio, klausa timbangtara masih wujud dan kekal berkuatkuasa kerana ia adalah satu perjanjian autonomi yang berasingan daripada perjanjian pengeluaran. Dalam apa keadaan, plaintif tidak menimbulkan apa-apa persoalan tentang kesahihan klausa timbangtara. Oleh itu, tiada merit dalam hujah plaintif bahawa klausa timbangtara adalah terbatal dan tidak berkuatkuasa kerana perjanjian pengeluaran telah dibatalkan oleh plaintif (lihat perenggan-perenggan 20–21).

(5) Persoalan tentang sama ada perjanjian pengeluaran tersebut adalah terbatal ab initio adalah satu pertikaian 'arising from' perjanjian pengeluaran dan/atau 'connected with' perjanjian pengeluaran terangkum dalam lingkungan cabang kedua kepada klausa timbangtara. Justeru itu, penimbangtara mempunyai kuasa untuk akhirnya mengendalikan persoalan tentang sama ada perjanjian pengeluaran adalah terbatal ab initio (lihat perenggan 23).

(6) Seorang penimbangtara yang dilantik menurut klausa timbangtara mempunyai kuasa untuk memutuskan sama ada pembatalan perjanjian pengeluaran plaintif adalah sah atau sebaliknya. Seksyen 34(1) Akta Relief Spesifik 1950 bukan satu peruntukan mandatori dan oleh itu, tribunal-tribunal lain tidak dihalang daripada memutuskan sama ada terdapat satu pembatalan perjanjian yang sah. Sewajarnya, defendan telah memenuhi keperluan ketiga (lihat perenggan-perenggan 32–33, 36).

(7) Berkaitan keperluan keempat, tiada keraguan bahawa defendan masih bersedia dan mampu membuat semua yang diperlukan untuk pengendalian betul timbangtara (lihat perenggan 37).]

Notes

For cases on incorporation of arbitration clauses, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1070.

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1285–1286.

For cases on arbitration, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5514–5522.

For arbitration agreements, see 13 *Halsbury's Laws of Malaysia* paras [220.008]–[220.015].

For reference to arbitration, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) para [10.3-105].

For stay of court proceedings, see 13 *Halsbury's Laws of Malaysia* paras [220.019]–[220.041].

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 (refd)
Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 (refd)
Cunningham-Reid & Anor v Buchanan-Jardine [1988] 2 All ER 438 (refd)
Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd [1993] 3 All ER 897 (refd)
Hevman & Anor v Darwins Ltd [1942] 1 All ER 337 (refd)
Radford v Hair & Anor [1971] 2 All ER 1089 (refd)

Legislation referred to

Arbitration Act 1952 ss 6, 25
Contracts Act 1950 ss 65, 66
Specific Relief 1950 s 34

Robert Low (HL Ooi and CK Yeoh (Ranjit Ooi & Robert Low) for the plaintiff.
CW Teo (YB Tan with him) (Khaw & Partners) for the defendant.

Azmel J:

[1] On 10 October 2000, the plaintiff and the defendant in this case executed a production agreement under which the defendant agreed to manufacture, pack and supply for the plaintiff various dairy products and in return for these works the plaintiff agreed to pay the defendant the charges at the rates agreed between the two parties. During the initial period of the agreement, everything appeared to have worked fine between the twp parties. However, commencing from August 2001, the plaintiff failed to make payments for products supplied by the defendant. On 4 January 2002, the defendant issued a demand letter to the plaintiff asking for payment of a sum of RM4,381,780.98 for products supplied and delivered to the plaintiff.

[2] Subsequently on 5 February 2002, the plaintiff issued a letter to the defendant purporting:

(1) to rescind the production agreement on the grounds that the plaintiff's consent thereto was vitiated by fraud and/or misrepresentation on the part of the defendant; and

(2) alternatively, to terminate the production agreement on account of breach of the term thereof.

[3] On 8 February 2002, the defendant sent a reply to the plaintiff's letter categorically refuting the plaintiff's right to rescind or terminate the production agreement or to claim damages from the defendant. At the same time, the defendant reminded the plaintiff that the production agreement still subsisted.

[4] On 26 February 2002, the plaintiff filed in court a writ of summons and statement of claim against the defendant. After entering an appearance, the defendant made an application for a stay of the court proceedings pending reference made to the arbitration (encl 14A). The defendant's application to refer to the arbitration is based on cl 13 of the production agreement which provided:

13 ARBITRATION

Any dispute or difference which may arise between the PARTIES at any time hereafter whether during the continuance in force of this Agreement or upon its termination, touching any matter or thing therein contained or the operation or construction of this Agreement or any matter or thing in any way connected with, arising from or in relation to this Agreement or the rights, duties, liabilities of the PARTIES hereunder shall be finally settled by arbitration in accordance with the Arbitration Act 1952 (Revised 1972).

[5] The Arbitration Act 1952 ('the Act') makes provision for any party to apply for a stay of proceedings where there is submission to arbitration. This is contained under s 6 of the Act, which reads:

If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

[6] It has been a well established principle that in order to succeed under s 6 of the Act the applicant must satisfy four requirements, namely:

(1) that the legal proceedings have been commenced against the applicant in respect of a matter which has been agreed should be referred to arbitration;

(2) that no other steps in the proceedings be taken by the applicant before the making of the application for stay;

(3) that there is no sufficient reason why the matter ought not to be referred to arbitration as agreed between the parties; and

(4) that the applicant was at the time of the application, remains ready and able to do all things necessary for the proper conduct of the arbitration.

[7] In respect of the first requirement, I was quite satisfied that the defendant had shown that the production agreement which became the subject matter of dispute between the plaintiff and the defendant contained an arbitration clause as provided by cl 13 (referred to above). I was also satisfied that this legal proceedings were commenced by the plaintiff by filing the writ of summons against the defendant on 26 February 2002 in this court.

[8] In respect of the second requirement, it was an undisputed fact that in this court proceedings all that the defendant had done was only entering of its appearance. The defendant had not even filed the statement of defence. In the light of such facts, I ruled that the defendant had not taken any steps in the proceedings yet.

[9] It was in respect of the third requirement that the plaintiff strenuously argued that it had more than sufficient reasons why the matter should not be referred to arbitration. The plaintiff had given the following grounds in opposing the defendant's application for a stay of the proceedings:

(1) that on a true and proper construction of the arbitration clause, the dispute between the parties therein does not fall within its scope;

(2) that the arbitration clause is void and ineffective as the production agreement has been rescinded by the plaintiff;

(3) that an arbitrator cannot determine the scope of his own jurisdiction;

(4) that the defendant's application, if allowed, would result in multiplicity of proceedings;

(5) that the plaintiff has a bona fide allegation of fraud against the defendant and hence a reference to arbitration would not be appropriate in accordance with s 25 of the Act; and

(6) that the arbitrator does not have the power to order rescission pursuant to s 34 of the Specific Relief 1950.

[10] In respect of the first ground, the plaintiff alleged that the plaintiff's consent to the production agreement was vitiated by fraud or misrepresentation on the part of the defendant. The plaintiff contended that the arbitration clause requires the production agreement to be in existence for it to be applicable.

[11] Since the production agreement was to be treated as never coming into existence in the first place since it has been rescinded ab initio by the plaintiff, the arbitration clause is not applicable.

[12] In reply, the defendant submitted that it is trite law that the remedy of rescission aims at restoring the contracting parties as much as possible to their original position as existed before the contract was signed. As such the right to rescind would be lost if the restitution is no longer possible. The defendant further submitted that the rescission of a voidable contract should conform to the provisions of ss 65 and 66 of the Contracts Act 1950, in that it must have the following consequences:

(1) the contract need not be performed by either party;

(2) the innocent party must restore any benefit received by him under the contract to whom it was received; and

(3) any person who has received any advantage under the contract must restore it or make compensation for it to the person from whom he received it.

[13] In support of its contention, the defendant referred to the Court of Appeal case of *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd and another appeal* [1999] 2 MLJ 500 where Gopal Sri Ram JCA said (at p 508):

> An action for rescission may be met by any equitable defences available against the claims for other form of specific relief, eg a plea of affirmation or laches or a plea that damages are an adequate remedy. Rescission may also be refused by a court on the ground that *restitutio in integrum* is not possible because eg an innocent third party's rights have been intervened in the interim.

[14] Based on the authorities it had cited, the defendant contended that the plaintiff could only rescind the production agreement ab initio if the plaintiff could not restore to the defendant all the benefits the plaintiff had received under the production agreement. The defendant had listed the following benefits that the plaintiff had received from the defendant by virtue of the production agreement:

(1) The defendant had manufactured, packed and supplied to the plaintiff various dairy products under the production agreement since 10 October 2001;

(2) The defendant had supplied dairy products to the plaintiff who then distributed and sold the same to its customers and these dairy products have been consumed by the plaintiff's customers; and

(3) The plaintiff still owed a substantial debt to the defendant for the dairy products taken delivery by the plaintiff pursuant to the terms of the production agreement.

[15] As to the plaintiffs allegation of fraud and misrepresentation committed by the defendant thereby resulting in the dispute no longer falling within the scope of the arbitration clause, the defendant replied that the question as to whether the plaintiff was induced to enter into the production agreement by fraud or misrepresentation was a 'dispute or difference' coming within the scope of the second limb of the arbitration clause particularly the usage of the words 'arising from' which have similar meaning with the words 'arising out'. The defendant referred to the case of *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 where the English Court of Appeal held that the disputes between the parties over a mistake made by one or both parties at the time when the contract was entered into or over a misrepresentation or negligent mistatement made by one party were disputes arising 'In connection' with the contract and therefore fell within the scope of the arbitration clause.

[16] Based on the submissions before me, I arrived at the conclusion that the disputes between the plaintiff and the defendant would come within the scope of the arbitration clause as provided under the production agreement even though the plaintiff had alleged that the production agreement was induced by fraud or misrepresentation by the defendant. Rescission of the production agreement could not be possible because the plaintiff could not restore the original position of the defendant as it was before the production agreement was signed.

[17] I was also satisfied that the words 'arising from' in the second limb of the arbitration clause are sufficiently wide to cover the determination of dispute as to whether the production agreement was induced by fraud or misrepresentation.

[18] In its second ground, the plaintiff contended that the arbitration clause was void and ineffective as the production agreement had been avoided. In reply, the defendant referred the English case of *Heyman and Anor v Darwins Ltd* [1942] 1 All ER 337 where Lord Porter said:

> If two parties purport to enter into a contract and a dispute arises as to whether they have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration … collateral to the agreement.

[19] The defendant also referred to the case of *Harbour Assurance Co (UK) Ltd v Kansa General International Assurance Co Ltd* [1993] 3 All ER 897, where the English Court of Appeal held that:

(1) an arbitration agreement, if sufficiently widely drawn, may include a dispute about the initial illegality of the contract and one contracting

party ought not prevent an arbitration from taking any place simply by alleging that the contract was void for initial illegality;

(2) under the doctrine of separability, the arbitration agreement being a self-contained contract collateral to the principal/containing contract, if not directly impeached, will survive the invalidity of the principal/containing contract; and

(3) an arbitrator is not prevented from determining an issue of initial illegality of a contract.

[20] In rejecting the plaintiff's second ground, the defendant contended as follows:

(1) Even if the production agreement was void ab initio for the various reasons alleged by the plaintiff, the arbitration clause will survive and remain effective;

(2) The arbitration clause is an autonomous agreement independent from the production agreement; and

(3) The plaintiff had not raised any issue or make any allegation on the validity of the arbitration clause, eg whether the plaintiff's consent to the arbitration clause (not the production agreement) was induced by fraudulent misrepresentation.

[21] In my consideration of this plaintiff's second ground, I agreed fully with the submission given by defendant's counsel. I therefore concluded that there was no merit in the plaintiff's contention.

[22] On the contention that an arbitrator cannot determine the scope of his own jurisdiction which the plaintiff had relied as the basis of its third ground, the defendant submitted that under the doctrine of separability of arbitration agreement, when the validity of the arbitration agreement is not an issue, ie impeached, the arbitrator is prevented from determining an issue of initial invalidity of a contract which contained the arbitration agreement. In the case of *Heyman and Anor v Darwins Ltd* [1942] 1 All ER 337, Lord Wright said as follows:

> … I should prefer to put it that the existence of his jurisdiction in this as in other cases is to be determined by the words of the submission. *I see no objection to a submission of the question whether there ever was a contract at all, or whether, if there was, it has been avoided or ended. Parties may submit to arbitration any or almost any question.* In general, however, the submission is limited to question arising upon or under or out of contract which would prima facie, include questions whether it has been ended and, if so whether damages are recoverable, and if recoverable, what is the amount. (Emphasis added.)

[23] Based on the principle of the above stated case as well as the fact that the plaintiff had not challenged the validity of the arbitration clause, the defendant submitted that the issue whether the production agreement is void ab initio should be a dispute 'arising from' the production agreement and/or 'connected with' the production agreement within the ambit of the second limb of the arbitration clause. The arbitration clause therefore empowers an arbitrator to finally deal with such matter.

[24] I was in full agreement with the contention given by the defendant's counsel.

[25] Under its fourth ground, the plaintiff contended that the defendant's application, if allowed, would result in multiplicity of proceedings. Under

this ground, the plaintiff submitted that its main cause of action against the defendant was the fraud and for the reason thereof the plaintiff had the right to rescind the production agreement. And the plaintiff's alternative cause of action was the defendant's fundamental breach of the production agreement and such breach would justify the plaintiff to terminate the production agreement. It was argued by the plaintiff that even if the alternative cause of action falls within the arbitration clause, the two causes of action should not be split by referring the alternative cause of action to arbitration and leaving the main cause of action with the court resulting in multiplicity of proceedings.

[26] It was my conclusion that this fourth ground of the plaintiff should be summarily dismissed since as discussed earlier the arbitrator is empowered to adjudicate both causes of action. Hence, the question of multiplicity of proceedings did not arise.

[27] As to its fifth ground, the plaintiff contended that there existed an issue of fraud against the defendant and hence a reference to arbitration would not he appropriate. However, the various authorities referred by the defendant do not appear to support the plaintiff's contention.

[28] In *Radford v Hair & Anor* [1971] 2 All ER 1089, the plaintiff opposed the defendant's application for a stay of proceedings on the ground that the defendant had made various allegations impugning the plaintiff's professional reputation. The court held that because the allegations were akin to allegations of fraud against the plaintiff and against such allegations, the plaintiff was entitled to have his case tried by a judge in open court.

[29] In the case of *Cunningham-Reid and Anor v Buchanan-Jardine* [1988] 2 All ER 438, the English Court of Appeal made the following principles:

1 Where a party accused of fraud opposed a stay of proceedings, the court would almost invariably refuse a stay; and

2 Where the party alleging fraud opposed a stay and the party accused of fraud wished to proceed to arbitration, the allegation of fraud was not by itself sufficient reason for the court to refuse a stay. Instead the Court had discretion dependent on all the circumstances of the case.

[30] In the same case, Bingham LJ said:

> The fact that an apparently strong case exist is a consideration relevant to the exercise of the court's discretion but one that can only be entertained with full recognition that the case has not been tried and that the defendant's contentions have not been disclosed, let alone investigated … there is no rule that it is appropriate to retain a case in the High Court because a charge of fraud is made against a professional or quasi-professional whether that person does not wish trial in open Court … The defendant here wants to arbitrate and is entitled by virtue of the agreement to arbitrate unless good reasons exist against the course. In my judgment there is no such good reason and the judge gave quite insufficient weight to the arbitration agreement, which is, in the language sometimes used by continental lawyers, the law between the parties.

[31] On this issue, it was my finding that the plaintiff had failed to give any good reasons as to why the disputes should not be referred to arbitration. On the other hand, the defendant had shown concern of likelihood of negative publicity that may befallen to the defendant with the likelihood of causing irreparable damage to the defendant's commercial reputation if the disputes

were to be heard in the open court. I therefore decided to exercise my discretion in favour of the defendant.

[32] Finally, the plaintiff contended that the arbitrator does not have the power to order rescission pursuant to s 34(1) of the Specific Relief Act 1950.

[33] In reply, the defendant submitted that s 34(1) of the Specific Relief Act 1950 is merely a permissive and not a mandatory provision by the use of the word 'may'. Therefore it does not prohibit other tribunal from deciding whether there is a valid rescission of an agreement.

[34] In support of such contention, the defendant referred to the case of *Ashville Investments Ltd v Elmer Construction* where Balcombe LJ, in considering the issue whether an arbitrator would have power to decide on the issue of a rescission of an agreement, held:

> The approach is summarized in the following proposition: (i) it is to be presumed that the parties intended to refer all the disputes arising out of a particular transaction to arbitration; (ii) it may also be presumed that the parties intended that all disputes should be determined finally by the same tribunal; and (iii) as a result of the decision in *Northern Regional Health Authority v Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, [1984] QB 644 it is clear that *an arbitrator may have powers which are not available to the Court. Therefore he should have those powers which are available to the Court.* (Emphasis added.)

[35] Based on the above arguments submitted by the defendant, I was quite convinced that an arbitrator appointed pursuant to the arbitration clause as contained in the production agreement would have the power to decide whether the plaintiff's rescission of the production agreement was valid or otherwise. As such, I also ruled that this sixth ground of the plaintiff should also fail.

[36] In the light of the above facts and circumstances, I came to the conclusion that the defendant had also satisfied the third requirement.

[37] As regard the fourth requirement, there were no doubts in my mind that the defendant remained ready and able to do all things necessary for the proper conduct of the arbitration. In fact, the plaintiff did not appear to dispute this fact. As such, the defendant had managed to satisfy all the four requirements.

[38] In the light of the circumstances as mentioned above, I allowed the defendant's application for a stay of proceedings pending arbitration. I also ordered that the cost of this application be borne and paid by the plaintiff.

Defendant's application allowed.

Reported by Lim Lee Na